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In The

Supreme Court of the United States

October Term, 1982

HOWARD L. CRIDEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the government's conduct in ABSCAM ensnaring petitioner Howard Criden in illegal activity through the use of an agent provocateur (Melvin C. Weinberg) and his corrupt, unwitting accomplice (Angelo J. Errichetti) — solely for the purpose of prosecuting petitioner and his co-petitioners — was so outrageous as to violate due process of law and fundamental fairness.

2. Whether the prosecution's misconduct in suppressing evidence and deliberately misleading the jury, defense counsel and the trial court and deliberately creating massive pre-indictment publicity violated due process of law and fundamental fairness.

PARTIES

The parties to the proceeding before the Court of Appeals for the Second Circuit whose judgment petitioner seeks to reverse were defendants-appellants Michael O. Myers, Angelo J. Errichetti, Louis Johanson and Howard L. Criden (Nos. 81-1342, 81-1343, 81-1344 and 81-1441, respectively), Frank Thompson, Jr. and John M. Murphy (Nos. 81-1345 and 81-1346, respectively), and Raymond F. Lederer (No. 81-1347), and appellee the United States of America.

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No.

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OPINIONS BELOW

The opinion of the Court of Appeals, reported at 692 F. 2d 823 (2d Cir. 1982), appears in Appendix A to the petition of John M. Murphy (hereinafter "Murphy App. A"), to which reference is made herein. The opinion of the Court of Appeals on petitioner Criden's petition for rehearing, not officially reported, appears as Appendix A hereto. The opinion of the United States District Court for the Eastern District of New York (Pratt, J.), reported at 527 F. Supp. 1206 (E.D.N.Y. 1981), appears in the appendix

to the petition of Frank Thompson (hereinafter "Thompson App."), to which reference is made herein.

JURISDICTION

The judgment of the Court of Appeals was dated and entered September 3, 1982. A timely petition for rehearing was denied on November 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Rules 17.1(a) and (c) of the Rules of this Court.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Procedural Background

Petitioner Howard L. Criden ("Criden") was charged in a three-count indictment alleging (1) a conspiracy to commit bribery

and to defraud the United States in violation of 18 U.S.C. §§201 and 371; (2) bribery of a public official in violation of 18 U.S.C. §201; and (3) unlawful travel in interstate commerce in violation of the Travel Act, 18 U.S.C. §§1952 and 2. Charged with Criden were Michael O. Myers, then United States Congressman for the First District of Pennsylvania; Angelo J. Errichetti, then Mayor of Camden, New Jersey; and Louis Johanson, then a member of the Philadelphia City Council. At the time of the indictment, Criden was 53 years of age and a partner in the Philadelphia law firm of Criden, Johanson, Dolan, Morrissey and Cook.

At the conclusion of a three-week jury trial presided over by the Honorable George C. Pratt, United States District Judge for the Eastern District of New York, Criden and his co-defendants Myers, Errichetti and Johanson, were convicted on all three counts of the indictment. After extensive post-trial hearings, Judge Pratt denied motions by petitioner and his co-defendants to vacate the guilty verdicts and dismiss the indictment on the ground that the government's conduct in the ABSCAM investigation and in the prosecution of charges at trial violated the Due Process Clause of the Fifth Amendment.

Thereafter, Criden's sentencing was delayed because he suffered a heart attack. On October 7, 1981, Criden was sentenced to concurrent periods of imprisonment for five years on each of Counts One and Three, and six years on Count Two, and to fines totaling forty thousand dollars ($40,000.00).

In an opinion dated September 3, 1982, the United States Court of Appeals for the Second Circuit (Lumbard, Friendly and Newman, JJ.), denied Criden's appeal from his conviction.[1] On

1. By the same opinion, the Court of Appeals affirmed the convictions of petitioner Criden's co-defendants Myers, Errichetti and Johanson and the convictions, in related ABSCAM cases, of defendants-appellants Frank Thompson, Jr., John M. Murphy (with the exception of his conviction on Count Three of the indictment against him, which was reversed and remanded for new trial), and Raymond F. Lederer (*see* 692 F. 2d at 826; Murphy App. A at 2a).

November 17, 1982, the Court of Appeals denied Criden's motion for rehearing.

Factual Background

"ABSCAM" is the code word given by the Federal Bureau of Investigation ("FBI") to an undercover operation undertaken by the FBI office at Hauppauge, Long Island, New York in January 1978 . ABSCAM began when the FBI adopted the plan of Melvin C. Weinberg, a long time confidence man who for several years in the mid 1970's, and while listed as an informant by the FBI, operated a "front-fee" confidence game utilizing a ruse similar to what became the ABSCAM premise (T 1862).[2] Although

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2. The following abbreviations have been used for citations to the record herein:

a. "DP____" refers to the transcript of the joint due process hearing before Judge Pratt held from January 12 through February 16, 1981. "DP Ex.____" refers to exhibits introduced during the due process hearings before Judge Pratt.

b. "T____" refers to the transcript of the trial in *United States v. Myers, et al.*, Cr. No. 80-00249, 80-00253 and 80-00291 (E.D.N.Y.), held on August 11 through August 30, 1980. "Gov't. or Def. Ex.____" refers to exhibits introduced during the *Myers* trial.

c. "PDP I____" refers to the transcript of hearings before Judge Fullam in *United States v. Criden, et al.*, Cr. No. 80-166 (E.D. Pa.) held on July 7 through July 30, 1980. "PDP II____" refers to a second series of hearings before Judge Fullam held on September 24 through September 26, 1980.

d. Other references to other ABSCAM trials, hearings or exhibits are in the same form, *e.g.*, the *Jenrette* trial transcript is referred to as "Jenrette T____"; the *Jenrette* due process hearing is referred to as "Jenrette DP____," etc.

finally caught and convicted for this fraudulent scheme,[3] Weinberg escaped the three-year jail sentence imposed after his conviction by making a deal to work for the FBI (527 F. Supp. at 1209; Thompson App. at 91a).

Under the ABSCAM scheme, Weinberg was to present himself as a business agent for "Abdul Enterprises," an organization backed by two extremely wealthy Arab sheiks looking for American outlets for their cash (*id.*). At first the ABSCAM investigation focused on the recovery of stolen art work and other contraband (*id.*). It was not until December 1978, when Weinberg met with then Camden Mayor Angelo Errichetti, that the investigation turned to political corruption (DP 4321).

Errichetti

Between December 1978 and July 1979 Errichetti was involved in a myriad of dealings with Weinberg and various FBI undercover agents who played supporting roles to Weinberg's lead. Among Errichetti's early ABSCAM episodes were his dealings with New Jersey Casino Control Commissioner Kenneth MacDonald and United States Senator Harrison Williams. Throughout his dealings with Errichetti, and with the explicit consent of his FBI supervisors, Weinberg portrayed himself as a corruptly disloyal employee of an Arab sheik of enormous wealth (T 1859-60). Moreover, Weinberg represented that he and those whom he selected as confederates could make personal fortunes by manipulating the sheik through the trust he placed in Weinberg. Errichetti, far from a shrinking violet, plunged into partnership with Weinberg. As discussed *infra* at pages 18-20, 22-25, despite petitioner's repeated discovery and *Brady* demands, it was not until the Senate Select

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3. This scheme netted Weinberg perhaps as much as one million dollars ($1,000,000.00) on which he paid no taxes (T 1925-25, 3400).

Committee released its findings in December 1982[4] that petitioner learned of the full extent of the arrangements made between Weinberg and Errichetti to share in bribes and fees, or the devious maneuvers Weinberg utilized to defraud his FBI superiors.

Criden and Johanson

The ABSCAM investigation had been ongoing for almost 18 months before petitioner and his law partner Johanson were lured into its web in their quest to obtain financing for a client's Atlantic City hotel-casino project (527 F. Supp. at 1210; Thompson App. 95a-96a).[5] In the course of inquiring as to financing sources for his client's project, Johanson was referred to Errichetti who, in turn, referred the matter to Weinberg who arranged for a discussion in Florida (*id.*).

On July 26, 1979, Criden, Johanson and Errichetti met with Weinberg and FBI Agent Anthony Amoroso ("Tony De Vito") on a yacht provided by the FBI (*id.*). Criden had not met either Errichetti or Weinberg prior to this meeting.

On the yacht, Criden and Johanson showed Weinberg and Amoroso architectural renderings and financial projections relating to the hotel-casino project (PDP I 7.20-22; T 579). Weinberg and Amoroso told Johanson and Criden that the sheik would be interested in the project (T 923). Weinberg further stated that he expected to secure the sheik's approval within 30 to 60 days (PDP I 1.8).

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4. Final Report of the Senate Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice (December 15, 1982) (hereinafter "Senate Select Committee Report").

5. The client had agreed that if the desired financing were to be obtained through Criden's efforts, a very substantial fee, between $3-5 million, would be earned by Criden's firm (PDP II 1.9). The government conceded that the attempt to arrange financing for the project was a legitimate business proposal (T 882, 1003, 1267; PDP I 3.123; PDP II 3.35).

Following the discussion of the hotel-casino project, the group took a pleasure cruise. During this trip, Amoroso stated to Errichetti that the sheik was concerned about political asylum because he anticipated that he would be forced to emigrate from his country in the future and wished to protect himself against the immigration problems experienced by Anastasio Somoza, the former Nicaraguan government leader, whose difficulties in obtaining asylum in the United States were then being detailed by the press (527 F. Supp. at 1210; Thompson App. at 95a-96a; *see also* T 580-81). Errichetti responded that "he could line up proper politicians to handle it" (T 581). Amoroso volunteered that money "would be no problem" (T 581).

On their return flight to Philadelphia, Errichetti told Criden that he looked upon the opportunities provided by the sheik through Weinberg as "fantasy, a fairytale" (PDP II 1.9, 1.117). Errichetti related that he had had prior business dealings with the representatives of the sheik and that the sheik would pay "substantial fees" to meet public officials with titles (PDP II 1.9). In this regard, Errichetti stated that he previously received a fee of $100,000 merely for introducing the representatives of the sheik to a public official (PDP II 1.10).[6] According to Errichetti, the sheik merely wanted to be associated with public officials; there were "no strings attached" (PDP II 1.117). Errichetti told Criden that if Criden were to introduce political figures to the sheik, it would enhance his chance to obtain financing for his client's hotel-casino project as well as result in a handsome fee for Criden (PDP II 1.119).

Upon his return to Philadelphia, Criden discussed the matter of introductions to politicians with his law partners, including Johanson (692 F. 2d at 830; Murphy App. A at 13a). Specifically,

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6. This apparently related to a $100,000 payment received by Errichetti in connection with the MacDonald matter. *See* p. 23, *infra*.

Criden explained that an introduction fee would be earned by the firm and shared with the politician and Errichetti merely for setting up a meeting with the sheik. No *quid pro quo* was involved; the politician would not be asked to do anything in return for the money (T 1268; PDP II 1.14). Johanson agreed to contact United States Representative Michael O. Myers, whom he knew as a fellow Philadelphia ward leader. (*See* 692 F. 2d at 830, 831; Murphy App. A at 13a, 16a.)

Myers

In early August 1979, Johanson met with Myers and Johanson described to him the "rich Arab sheik" who would pay $100,000 in return for introductions to important persons (T 2709). Johanson told Myers that he and Criden would receive $25,000 as a share of this fee for arranging the introduction and that Myers would receive the same amount as his share. The balance, stated Johanson, would be split among Errichetti, Amoroso and Weinberg (T 2712). When Myers asked Johanson whether anything would be expected of him, Johanson assured Myers that Myers would not be required to do anything in return for the money (T 2712). Johanson concluded the conversation with the comment that Errichetti would tell Myers "word for word just what to do and what to say" (T 2713).

Thereafter, a meeting was scheduled for August 22, 1979 at the Travelodge International Hotel at Kennedy Airport in New York (692 F. 2d at 830; Murphy App. A at 14a). Immediately prior to this meeting, Errichetti met with Myers, telling the Congressman

> You've got to come on strong . . . Did you ever see me on television? . . . You know how positive I am, how strong I come on? That is the way you've got to act. The Sheik likes tough guys. Tell

> how powerful you are. Maybe talk about immigration. You will never do anything. Don't worry about that. I got that covered. . . . Mel is going to be in the room with us. Mel is our friend. He wouldn't let anything happen to get you in trouble. (T 2717).

Loathe to leave anything to chance, Weinberg slipped out of the hotel room where FBI technicians were making final preparations to videotape the meeting, and, ostensibly without the knowledge of the FBI supervisor in charge of the investigation (DP 2673), went to the hotel lobby to give Errichetti a final set of instructions (T 1650). (*See* discussion *infra* at pages 15-16.)

Thereafter, Errichetti informed Myers of a change of plans, *i.e.*, that the sheik would not be at the meeting, although one of his representatives would be present. Myers, who had previously been assured by Errichetti that he could talk about any topic since the sheik was not fluent in English, expressed concern that questions would be asked of him which he could not answer (T 2718). Errichetti responded:

> Tell them [you will] do anything they want, don't worry about that. You don't ever have to worry about the Sheik coming to America because Mel already told me if he has to leave his country arrangements have been made in South America and they never intend to come to America. (T 2718).

Myers and Errichetti then went up to the hotel room where Weinberg and Amoroso were waiting. Neither Criden nor Johanson attended this meeting although both had come to the airport. Neither Criden nor Johanson was invited to participate

in the conversations wherein Weinberg instructed Errichetti and Errichetti coached Myers.[7]

Myers cannot be criticized for underplaying his role. In the course of the August 22, 1979 meeting he repeatedly exaggerated his position, influence and personal associations (692 F. 2d at 830-31; Murphy App. A at 14a). Myers readily agreed to assist the sheik with any immigration problem and, if necessary, to introduce a private bill on the sheik's behalf (*id.*). At the conclusion of the meetings, Myers was handed an envelope by Amoroso containing $50,000 in cash (*id.*). Upon leaving the hotel room, Myers gave the envelope to Errichetti and Johanson and Myers immediately drove back to Philadelphia. (*Id.*; *see also* T 2740.) Myers never saw or spoke to Errichetti again (T 2740).

Prior to departing from New York, Errichetti met briefly with Criden and transferred the envelope to him, after removing $15,000 as his share of the proceeds. (*See* 692 F. 2d at 831; Murphy App. A at 15a.) Criden then returned to his law office in Philadelphia where he met with Johanson and Myers (*id.*). Myers accepted $15,000 and then departed (*id.*).

Aside from the general report from Errichetti to Criden that Myers had done well, no one reported the substance of the meeting to Criden or Johanson.

Consistent with Weinberg's assurances (to Errichetti, and, indirectly, to Myers, Criden and Johanson) that Myers would never be called upon to do anything for the Sheik, Myers was never asked by the investigators for so much as a telephone call or letter of inquiry on official stationery to demonstrate a willingness to actually use his position in return for the money he accepted.

7. The Court of Appeals erroneously attributed to Criden a role in coaching Myers (*see* 692 F. 2d at 837, 838, 840 and n.14, 842; Murphy App. A at 28a, 31a, 36a and n.14, 41a). Manifestly, the evidence showed that Criden played no part in Myers' coaching (T 2715-19).

Criden Replaces Errichetti

In the ensuing months Criden became more entangled in the ABSCAM web. With the possibility of concluding the Atlantic City hotel-casino financing deal and with other attractive business opportunities dangled before him, Criden continued to try to accommodate Weinberg's voracious appetite for public officials to meet the sheik's representatives and collect their free money. Criden eventually replaced Errichetti (who had tired of Weinberg's inability to deliver on promises of major projects to be funded by the sheik) in fishing the rivers and tributaries of public officialdom — using the promise of hundreds of millions in investments in the politician's district as bait for the desired meetings. Although only one of these transactions — a January 24, 1980 meeting among Criden, Myers and two FBI undercover agents — was admitted into evidence at trial, we mention them here in order to illustrate the evolving relationship between Criden, Errichetti and Weinberg.

The January 24, 1980 Meeting

Although Eastern District Strike Force Chief Thomas P. Puccio submitted his pre-prosecution memorandum covering, *inter alia,* Representative Myers in December 1979, the United States Attorney's Office in Philadelphia requested an opportunity to lure Myers into another videotaped session where local Philadelphia corruption could be discussed. Criden was selected as the appropriate vehicle to arrange Myers' return engagement.[8]

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8. By late January 1980, Criden was dealing with the sheik's representatives on a C.O.D. basis — irrespective of whether the politician he produced would mouth the words triggering payment to him, Criden was promised, and received, payments simply for bringing politicians to the scheduled meetings (PDP II 1.46-51). In the case of the "second" Myers meeting, Criden was promised $5,000 merely for producing Myers at the meeting (PDP II 1.46).

Weinberg advised Criden that the sheik, who proposed to build a multi-million dollar hotel complex in the slums of South Philadelphia, wanted assurances from local office holders that he would not run into zoning problems for such a project.[9] Weinberg suggested that Criden introduce Representative Myers to a Michael Cohen, who was identified to Criden as a "new" representative of the sheik, but who actually was FBI Agent Michael Wald (PDP II 1.48).

Thus Criden telephoned Myers on January 24, 1980, inviting him to meet the sheik's "new" representative who was interested in investing money in Philadelphia (T 2743). Myers agreed to meet Mr. Cohen that evening at the Barclay Hotel in Philadelphia (692 F. 2d at 831; Murphy App. A at 15a). Myers testified at trial that he believed the same ground rules applied at this meeting as were applicable at the prior meeting, namely that he "had to impress them that [he] was a strong guy the same way [he] did back in the August meeting" (T 2747).

Again, Myers' performance must have exceeded the investigators' expectations. Aided by substantial quantities of alcohol pressed on him by the agents, Myers again exaggerated his importance and his association with various "influential" individuals.[10] Myers also complained that he had been short-changed in his earlier dealings with the sheik's representatives, and the undercover agents offered to pay him an additional $35,000

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9. For a summary of this undercover scenario, *see United States v. Jannotti*, 501 F. Supp. 1182, 1193-99 (E.D. Pa. 1980), *rev'd*, 673 F. 2d 578 (3d Cir.), *cert. denied*, 102 S. Ct. 2906 (1982).

10. For example, when Cohen asked him about the Philadelphia Mafia, Myers boasted of his relationship to one "Skinny Razor" whom he described as a big man in the Mafia's downtown operation in Myers' own district (Gov't. Ex. 7A at 83). In point of fact, the said Mr. Razor — the subject of a lurid newspaper story in Myers' youth — had been dead for over a decade (T 2625-26).

(692 F. 2d at 831; Murphy App. A at 15a). Consistent with Weinberg's previous assurances, no request was made of Myers after this meeting to perform the slightest official act. The tape of the January 24, 1980 meeting was admitted into evidence over the objections of all defendants (T 2571).

REASONS FOR GRANTING THE WRIT

I.

The government's conduct in ensnaring petitioner in illegal activity was so outrageous as to violate due process of law and fundamental fairness.

In utilizing Weinberg and Errichetti to produce and compromise Representative Myers at the August 22, 1979 meeting, the government was relying on men of *proved* unreliability, whose willingness to lie, misrepresent and otherwise play fast and loose with the truth to satisfy their own ends already was well documented. Judge Fullam found that Weinberg "represented the archetypical amoral fast-buck artist." *United States v. Jannotti,* 501 F. Supp. 1182, 1193 (E.D. Pa. 1980), *rev'd,* 673 F. 2d 578 (3d Cir.), *cert. denied,* 102 S. Ct. 2906 (1982). Errichetti, whose dealings with the ABSCAM undercover operatives had predated the Myers transaction by some eight months, was already known by the ABSCAM investigators to exaggerate, boast and generally go beyond the limits of truthfulness in his dealings with Weinberg and others. Despite knowledge of Weinberg's and Errichetti's lack of trustworthiness, the government made no effort to impose even minimum safeguards on their involvement in the ABSCAM investigation.

Indeed, Weinberg was unsupervised at least half of the time he was engaged in ABSCAM (T 1054; Jenrette T 862, 924). Moreover, although Weinberg's background as a lifelong

confidence man and swindler might have suggested that he would cut corners to achieve his assigned objective of maneuvering public officials before the FBI cameras, the government did not implement special controls for Weinberg nor even seek to enforce those instructions which were given to Weinberg.

For example, although Weinberg was ordered to tape every conversation he had with a middleman or public official (T 939), he disobeyed this instruction with regularity and with impunity, and only a fraction of his conversations were recorded (DP II 1.36). And, although Weinberg claimed to have furnished to the FBI all of the tapes he made of conversations with targets and middlemen, his assertion that certain tapes were stolen from him was incredible at best (T 1839, 3413).[11]

Furthermore, Weinberg deliberately violated an instruction that he tape all conversations from beginning to end (T 939-41, 1050, 1057; PDP II 3.29; Jenrette T 911). While Weinberg claimed no tape was altered or interrupted, expert testimony established the contrary at the *Myers* trial (T 1638, 1885, 3349, 3372). Additional evidence of Weinberg's tampering with tape recordings surfaced only after the conclusion of the trial.[12]

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11. *See infra* at p. 24.

12. For example, a tape-recording of a July 14, 1979 conversation between Weinberg and George Katz, a figure in the ABSCAM investigation involving Senator Williams, was not made available to petitioner and his co-defendants until the post-trial due process hearings (DP Ex. 58). This tape, which included a 57 foot gap, provides a cornucopia of compelling circumstantial evidence supporting a number of petitioner's contentions at trial. Significantly, this tape demonstrates that two weeks prior to Criden's meeting on the yacht with the sheik's representative, Weinberg set forth the essential elements of the asylum scenario and the double sting, *i.e.* that the politicians would not be called upon to perform (DP Ex. 58 at 3, 11, 14-16, 21-23, 29). (*See also*, discussion *infra* at p. 25.)

Moreover, Weinberg was given carte blanche in his contact with middlemen allowing him "to operate in the manner he thought best" (PDP II 3.17, Jenrette T 888-90, 912). Weinberg received no direction as to when he should report conversations with middlemen and such oral reports as he did make were never reduced to writing (PDP II 3.5).

Nor was Errichetti given sufficient supervision although he had become, at least as of June 28, 1979, an agent of the ABSCAM operatives for purposes of attracting public officials to meet with undercover agents (692 F. 2d at 840 n.13; Murphy App. A at 35a-36a n.13). For example, while the New Jersey prosecutors attempted to admonish Weinberg for his actions in connection with Senator Williams, absolutely no effort was made to correct Errichetti's subsequent use of those same tactics with Myers. In fact, Errichetti testified that the same scenario as was used with Senator Williams was set for Representative Myers (PDP II 1.120-22), *i.e.*, the Congressman was instructed "to come on strong," "play act," "promise anything" (PDP II 1.120, 1.134).

Nor was any effort made by the FBI to tape-record the prearranged meeting between Weinberg and Errichetti which immediately preceded Myers' August 22 scheduled introduction to the "sheik" (later modified to his representatives). (*See* discussion *supra* at page 9.) Significantly, Agent Good, who was present at the hotel prior to the August 22, 1979 Myers meeting, testified he had no knowledge that Weinberg left the room to meet with Errichetti before Myers was brought upstairs (DP 2673-74, 4153).[13] Thus, Weinberg was able to get Errichetti to do the briefing of Myers — the same duty Errichetti had shared

13. The same Agent Good acknowledged that he had authorized Weinberg to meet with Senator Williams to brief him as to what was expected to be heard from him when he addressed the sheik (Myers DP 2809).

with Weinberg *vis-a-vis* Sen. Williams — instructing him to have Myers go on stage for twenty minutes, talk tough, promise anything, that it was all "play-acting" and that the Congressman would never be called upon to do anything (PDP II 1.119-121).

Weinberg's credentials as a master con artist who spent his entire adult life living by his wits at the expense of those whose trust he gained is amply documented in the record (T 1921-30, 1993-99). That Weinberg could have been used at all seems to be a direct contravention of Justice Department guidelines.[14] But to have used him as an agent-provocateur — not as an "informant" as the government would like him characterized — was intolerable. The absence of instruction, supervision and reporting requirements relating to Weinberg allowed him to structure the investigation according to his own design, "scamming" both the targets and, presumably, his FBI and strike force "supervisors."[15]

In achieving the "bottom line" result of producing incriminating videotapes, Weinberg was armed by his supervisors with two important facts: first, he was told that the Congressmen would never be called upon to perform any official act (PDP II 3.26); and second, he was allowed to incorporate as part of the "scenario" that he and Amoroso would portray themselves as disloyal to the eccentric sheik (T 1860-61, 2102, 2107; DP 4373; PDP I 5.142).

Thus, Weinberg could with impunity assure the prospective target — be he public official or middleman — that the public official need only talk tough and come on strong, agree with whatever was suggested, and emphasize his own importance

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14. *See* DP Ex. 6, the so-called Levi Guidelines.

15. *See infra*, pp. 22-26.

(Schwartz T 2.96-97; PDP II 1.39, 1.120). All this conformed to the "Arab way" and was expected (Schwartz T 2.106). At the same time, Weinberg could give assurance that nothing would ever be requested of the official; it was all talk, "all bullshit," so that Weinberg/Amoroso and the others could split the resulting fees from the "goose that laid the golden egg" (T 1860-61). Not only did the government use a man whose *past* suggested that he would be unreliable and would have no respect for an oath to tell the truth, but his very dealings with the ABSCAM team demonstrated as much.

The Court of Appeals erred in its analysis of the adequacy of the materials made available at trial relating to Weinberg's credibility. Basically, the court found adequate the information relating to Weinberg's history of misconduct *prior* to ABSCAM and the payments he received from the government in connection with ABSCAM (692 F. 2d at 846-47; Murphy App. A at 49a-51a). But the court's reasoning misses the mark. The extraordinary danger in using Weinberg as the government did in ABSCAM was that he would *continue* to lie and cheat and would skew the investigation to maximize his rewards no matter how justice might be perverted.[16]

While the Circuit Court points to one clear example of Weinberg's coaching involving Senator Williams and Errichetti (692 F. 2d at 839-40; Murphy App. A at 32a-36a), several other examples of misconduct — known contemporaneously to the government during the investigation, as well as others which have come to light after the trial — further demonstrate Weinberg's ability to claim rewards for achievement in return for what was really a charade.

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16. It is here that the due process, government overreaching/prosecutorial misconduct argument becomes inextricably intertwined with the *Brady*, *Giglio* and *Agurs* arguments set forth *infra* at pp. 21-26.

* * *

1. The Williams Coaching Session. In June 1979, Errichetti assured Weinberg that he had instructed United States State Senator Harrison Williams as follows:

> . . . All you're gonna do is give a speech like you never gave in your life. Not much left to say. You're gonna fucking guarantee that fucking contract. . . . I said, "You're gonna fucking say it. I don't give a fuck. *Never mind about doing it. You're gonna fucking say it.*"

Senate Select Committee Report, "Allegations Regarding the Investigation of Senator Harrison A. Williams," at 56 (emphasis added). In connection with the Williams'coaching episode, FBI supervisor John Good testified that he had instructed Weinberg to meet privately with Senator Williams "to brief him as to what we expected to hear from him when he addressed the Sheik." (Myers DP 2809). The Senate Committee concluded:

> "To instruct Weinberg to meet with the suspect, without being accompanied by any undercover special agent, only moments before a crucial meeting at which an expression of the suspect's true intentions was to be sought was not merely undesireable; it was egregious."

(Senate Select Committee Report, "Allegations Regarding the Investigation of Senator Harrison A. Williams," at 60).

2. The MacDonald Pay-Off. In another pre-Myers situation involving New Jersey Gaming Commissioner Kenneth MacDonald, Errichetti candidly told Weinberg he would never offer or give MacDonald any money. Weinberg's response was that they would

"hold that in abeyance, we'll work on that."[17] (Transcript, March 8, 1979, at 27; *see also,* Senate Select Committee Report, "Allegations Regarding Kenneth H. MacDonald," at 19). Ultimately, an agreement was struck between Weinberg and Errichetti wherein Errichetti was given $100,000 in currency while MacDonald looked the other way. MacDonald was indicted but died before trial.

To add icing to the cake, Weinberg, as we now know, induced Errichetti to engage in a completely staged conversation on April 1, 1979 about the MacDonald "payoff," ostensibly for the purpose of impressing another employee of the fictitious sheik who would be "surreptitiously" listening to the "private" conversation between Weinberg and Errichetti.[18] Again, this tape was withheld from petitioner.

3. Katz Tape-Recording. In a July 14, 1979 taped conversation between Weinberg and one George Katz (DP Ex. 58), Weinberg laid out the essential elements of the devious double sting — that the politicians, even though paid, would not be called upon to perform: "between you and me we don't want and probably never even use them, you follow me?" (DP Ex. 58 at 22).

4. Williams Forgery. In another example of double-scamming, Weinberg accepted Errichetti's known *forgery* of a letter purportedly signed by Senator Williams showing support for the sheik's project when Errichetti stated that *Williams* would not himself sign such a letter (302 Report of Bruce Brady, Sept. 14, 1979; *see also,* Senate Select Committee Report, "Allegations

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17. This tape was withheld from Criden until after the Myers trial.

18. *See* Senate Select Committee Report, "Allegations Regarding Kenneth N. MacDonald," at 35.

Regarding the Investigation of Senator Harrison A. Williams," at 55 fn.).

5. The Mario Noto/Nopo Incident. The clear understanding between Errichetti and Weinberg that their partnership was based on *defrauding* the mythical sheik reached its zenith a few weeks after the August 22, 1979 Myers meeting when Errichetti produced an impersonator posing as an Immigration and Naturalization Service official to meet with Weinberg and Amoroso (T 1239, *et seq.*).

* * *

As demonstrated above, Weinberg was clearly an agent provocateur. The Court of Appeals misperceived Weinberg's role, finding that "the essential conduct of the agents and their paid informant was to see who showed up to take the bribes and videotape them in the act of doing so." [692 F. 2d at 837 (footnote omitted); Murphy App. A at 29a (footnote omitted)]. Furthermore, even without the benefit of information uncovered by the Senate Committee, the Court of Appeals erred in concluding that "[w]hatever may be the due process limit of government participation in crime, it was not reached here." [*id.* (citations omitted)]. Clearly, the government's involvement in the ABSCAM "crimes" surpassed the "level of outrageousness" which ought to limit the police in a free society. *Hampton v. United States,* 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring). *See also, United States v. Russell,* 411 U.S. 423, 441 (1973) (Stewart, J., dissenting). *Compare, United States v. McQuin,* 612 F. 2d 1193, 1196 (9th Cir.), *cert. denied,* 445 U.S. 954 (1980); *United States v. Quintana,* 508 F. 2d 867, 876-78 (7th Cir. 1975).

Moreover, the government's conduct was particularly egregious here because, as the trial court found (527 F. Supp. at 1226; Thompson App. at 148a), Criden and the other defendants

were not suspected of misconduct at the time they were lured into the ABSCAM net. The inducement initially dangled before Criden and his law partners to become involved with the ABSCAM operatives was overwhelming. The opportunity to earn millions of dollars in fees in connection with obtaining financing for a legitimate substantial hotel-casino project was, as one of Criden's law partners described it, a lawyer's "once-in-a-lifetime" dream come true (T 1262-63).

II.

The prosecution's willful failure to comply with its obligations to protect the integrity of the judicial process was a continuation of a course of misconduct and requires dismissal of the indictment.

The course of prosecutorial misconduct relating to the ABSCAM investigation did not cease with the return of the indictments. In several crucial areas of inquiry the prosecution either suppressed evidence or deliberately misled the jury, defense counsel and the trial court. In other areas, Weinberg's perjuries and obstructions of justice remained hidden until investigative bodies other than the Department of Justice brought them to light, well after the trial.

Despite sufficient judicial warning against the danger of uncontrolled use of "informants" who might corrupt the truthseeking process [*see United States v. Brown*, 602 F. 2d 1073 (2d Cir.), *cert. denied*, 444 U.S. 952 (1979)], and the obligations imposed by *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959); *Giglio v. United States*, 405 U.S. 150 (1972); and *United States v. Agurs*, 427 U.S. 97 (1976), information crucial to the defense was deliberately withheld, and material perjury was committed in the course of petitioner's trial.

For example, the Court of Appeals concluded that "the jury was entitled to conclude that this [*i.e.*, the Myers August 22, 1979

meeting] was no charade." (692 F. 2d at 838; Murphy App. A at 32a). Conversely, however, the jury would have been entitled to reject Weinberg's denial that he orchestrated a charade in the *Myers* case, particularly if it had before it the relevant facts concerning Weinberg's willingness to orchestrate *other* charades in the same time frame for which he was paid handsomely by the FBI, as well as his obvious willingness to defraud the FBI for additional personal profit in matters material to ABSCAM.

The requirements of brevity dictate that petitioner can only list the areas relevant to this point:

1. The prosecution failed to correct Weinberg's perjurious testimony at the *Myers* trial wherein he misstated the reason for a $15,000 bonus he received from the FBI. As was later documented, a few weeks before the Myers meeting was arranged, Weinberg was paid $15,000 for his role in the MacDonald/Errichetti payoff (DP Ex. 59; T 1815). The prosecution left the defense and the trial court with the false impression that the $15,000 bonus was unrelated to ABSCAM (T 1736-38, 1776, 3045).[19] The Court of Appeals did not discuss this matter even though petitioner Criden set out the full background at pages 53-60 of his appellate brief below.

2. Weinberg defrauded the FBI out of a $5,000 bonus involving an incident wherein he supposedly risked his life to save the ABSCAM investigation (DP Ex. 61). After the trial, it was learned that Weinberg had fabricated the entire story simply to obtain money from the FBI (DP 4362).[20]

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19. As of April 1981, Weinberg had received approximately $150,000 for his ABSCAM efforts (527 F. Supp. at 1240; Thompson App. at ____).

20. *See also*, Senate Select Committee Report, "Introduction," at 36, *et seq.*

3. Weinberg surreptitiously received from Errichetti a portion of the $100,000 paid to Errichetti supposedly for MacDonald. Weinberg's deviousness in obtaining this kickback, obstructing justice and constructing an alibi for his perjurious denials provide an astounding insight into the criminal mind:

a) Weinberg deliberately failed to record a conversation with Errichetti in which plans for receipt of the kickback were made;

b) On April 1, 1979, the day after the $100,000 was paid to Errichetti ostensibly for transmittal to MacDonald, Weinberg met privately with Errichetti to receive the kickback, unbenounced to the FBI agents working with him;

c) To provide an alibi for later use, Weinberg recorded a conversation with Errichetti for which he constructed a false preamble which misrepresented the actual time of the conversation; and

d) Weinberg got Errichetti to make certain statements on the "alibi tape" by telling Errichetti that someone (whom Weinberg needed to mislead) was going to be "secretly" listening to their conversation.

All of the above was pieced together after the Myers trial by prosecutors from Washington, D.C. and members of the Senate Select Committee who had access to Weinberg's telephone toll records (which were refused petitioner). *See* Senate Select Committee Report, "Introduction," at 36-40.

4. Weinberg deliberately failed to record dozens of substantive conversations he had with ABSCAM targets and deliberately omitted portions of certain conversations from the tapes he turned in (Def. Ex. 19, 20; T 3319-24). *See also,* Senate

Select Committee Report, "Failures of Evidence Management," at 20.

5. Weinberg deliberately withheld at least one other tape recording he had made of a conversation with petitioner, falsely claiming it had been stolen from his luggage (T 1839, *et seq.*; Jenrette DP 1099-1104).[21]

6. Weinberg, with at least the government's passive assistance, perjured himself at the *Myers* trial about his unauthorized solicitation of money and other items from the targets of the investigation. At trial, the defense produced witnesses who testified to personal knowledge of various items including, *inter alia*, television sets, stereo equipment and an electronic oven delivered from Errichetti to Weinberg. Weinberg and the prosecution vigorously refuted these allegations, branding the defense witnesses as biased perjurers.

After the post-trial due process hearing Weinberg's wife committed suicide and in the course of the ensuing investigation by Florida County police, the very items Weinberg was alleged to have received were found in his home. Since the FBI agents were present in this home on several occasions *after* the allegations of Weinberg's solicitation and receipt of these specific items were made, their failure to report the items is at least suspect.[22] Unfortunately, the continued cover-up regarding these items

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21. The Senate Committee Report sets forth Weinberg's "astounding plethora of self-contradictory testimony" on this subject. *See* Senate Select Committee Report, "Failures of Evidence Management," at 41-48.

22. For an extensive discussion of this issue, *see* Senate Select Committee Report, "Management, Supervision, and Control of Weinberg," at 1-21. As to FBI supervisor Good's testimony on the subject, the Committee found: "While it may not be technically perjurious, such clearly misleading testimony constitutes unacceptable conduct that ranking FBI officials should not tolerate." *Id.* at 11 fn.

resulted in the court below crediting Weinberg's perjurious denials (692 F. 2d at 846-47; Murphy App. A at 49a-50a).

The importance of Weinberg's perjury on these items should not be underestimated. The question of whether Weinberg would lie to his FBI "supervisors" to achieve his personal goals in the investigation was central to the defense of the *Myers* case.

7. The government suppressed a July 14, 1979 tape-recorded conversation between Weinberg and "middleman" George Katz (DP Ex. 58). This tape would have greatly assisted the defense by providing an explicit recitation by Weinberg to Katz of the "double-scam" *i.e.*, that the politicians who would accept money would not have to actually do anything. Weinberg further confided in Katz that his employers ". . . don't know what's going on on our end. . . . they don't think anything's wrong on the double." (DP Ex. 58 at 29).

The court below correctly concluded that the "use of dishonest and deceitful informants like Weinberg creates risks to which the attention of juries must be forcefully called." (692 F. 2d at 846; Murphy App. A at 48a). Yet, demonstrably the trial jury here saw only the tip of the iceberg. Their ability to evaluate not just Weinberg's sordid past, but the full extent of his venality during the investigation was fatally obstructed by perjury and obstruction of justice which was not unraveled until after the trial.

To this sordid witches' brew must be added the government's outrageous and deliberate leak to the public media of the prosecution's version of the ABSCAM investigation several weeks before the return of indictments. The trial court found:

> First, the voluminous appendices to the parties' papers, containing thousands of pages of reprinted newspaper and magazine articles as well as

> transcripts of radio and television broadcasts, attest to the fact that beginning on February 2, 1980 and continuing to the date of these indictments and beyond, the public was deluged with media reports of the ABSCAM investigation into these defendants' activities. Moreover, many of these reports were replete with what may charitably be characterized as hostile statements and innuendo, treating the defendants' guilt as a foregone conclusion, itemizing the "evidence" against them, and reporting that "indictments were forthcoming." Finally, we must, in the light of the government's admission of the fact, accept the contention that many of these reports contained information supplied by one or more Justice Department officials. . . .

United States v. Myers, 510 F. Supp. 323, 324-25 (E.D.N.Y. 1980).

CONCLUSION

The combination of governmental overreaching in creating crime for the sole purpose of prosecuting those who succumbed to extraordinary inducements, the disregard for safeguards designed to protect against abuses of due process, the willingness of those running the investigation to allow a thoroughly amoral individual free reign to use any means at his disposal to ensnare the unwary, the deliberate and pernicious government leaks to the press, and the deliberate attempt by the prosecution to withhold, cover-up and obfuscate exculpatory evidence require that the petitioner's conviction be overturned. Even if none of these abuses taken alone would justify reversal, taken together they provide a mosaic of such outrageous misuse of prosecutorial power and resulting unfairness to petitioner that the conviction obtained thereby must be overturned.[23]

WHEREFORE, petitioner respectfully urges this Court to grant certiorari and, upon that grant, to vacate the decisions of the Court of Appeals and the District Court and overturn his conviction.

Respectfully submitted,

RICHARD BEN-VENISTE
Attorney for Petitioner

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23. Petitioner Criden also adopts, to the extent applicable, the arguments set forth by his co-defendants in their related petitions for certiorari.

APPENDIX A — COURT OF APPEALS ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Nos. 81-1342; 81-1343; 81-1344; 81-1446; 81-1345; 81-1346; 81-1347

FILED NOV. 17, 1982

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of November, one thousand nine hundred and eighty-two.

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL O. MYERS, ANGELO J. ERRICHETTI, LOUIS JOHANSON, and HOWARD L. CRIDEN,

Defendants-Appellants.

UNITED STATES OF AMERICA,

Appellee,

v.

Appendix A

FRANK THOMPSON, JR. and JOHN M. MURPHY,

Defendants-Appellants.

UNITED STATES OF AMERICA,

Appellee,

v.

RAYMOND F. LEDERER,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed by counsel for the defendants-appellants, Michael O. Myers, Angelo J. Errichetti, Louis Johanson, and Howard L. Criden.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

s/ Maureen Mintzer
Operations Manager

Office-Supreme Court, U.S.
FILED
MAY 12 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-1183, 82-1187, 82-1199, 82-1240, and 82-1255

In the Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND F. LEDERER, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN M. MURPHY, PETITIONER

v.

UNITED STATES OF AMERICA

FRANK THOMPSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

HOWARD L. CRIDEN, PETITIONER

v.

UNITED STATES OF AMERICA

MICHAEL O. MYERS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government must have probable cause to suspect a member of Congress of a crime, or of a predisposition to commit a crime, before it conducts an investigation of him and videotapes his meetings with undercover agents.

2. Whether the Due Process Clause barred petitioners' convictions for offenses relating to bribery because the unlawful payments were offered by undercover government investigators, because a government informant allegedly urged certain petitioners to be as explicit as possible in stating what they would do in return for the illegal payments, or because the informant allegedly engaged in misconduct that did not prejudice petitioners.

3. Whether the government improperly concealed exculpatory evidence, so that certain petitioners' convictions should be reversed.

4. Whether a ready response to an undercover agent's offer of an illegal payment can be sufficient to establish predisposition, and thereby defeat petitioner Lederer's entrapment defense.

5. Whether petitioner Murphy's conviction should be reversed because of error in the supplemental instruction given to the jury.

6. Whether the district court gave too unfavorable an instruction on petitioner Thompson's credibility as a witness at his own trial.

7. Whether evidence of a meeting between petitioner Myers and undercover agents, occurring after the illegal payment was made to petitioner Myers, was improperly admitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1183

RAYMOND F. LEDERER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 82-1187

JOHN M. MURPHY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 82-1199

FRANK THOMPSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 82-1240

HOWARD L. CRIDEN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 82-1255

MICHAEL O. MYERS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-83a)[1] is reported at 692 F.2d 823. The opinion of the district court (Pet. App. 84a-249a) is reported at 527 F. Supp. 1206. The opinion of the court of appeals on an interlocutory appeal by petitioner Myers (Pet. App. 250a-272a) is reported at 635 F.2d 932. The opinion of the court of appeals on an interlocutory appeal by petitioners Murphy and Thompson (Pet. App. 273a-282a) is reported at 642 F.2d 699.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1982. The petitions for rehearing were denied on November 17, 1982. The petitions for a writ of certiorari in Nos. 82-1183, 82-1187 and 82-1199 were filed on January 14, 1983; the petitions in Nos. 82-1240 and 82-1255 were filed on January 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

STATEMENT

Petitioners were convicted, in three jury trials in the United States District Court for the Eastern District of New York, of offenses arising out of what is known as the Abscam investigation.

1. In the course of this investigation, Melvin Weinberg, an FBI informant, acted as the representative of a fictitious organization supposedly backed by two wealthy Arab sheiks seeking to invest their money in the United States. Petitioner Errichetti, the mayor of Camden, New Jersey, and a New Jersey state senator, contacted Weinberg in connection with investments in casinos then being built in Atlantic City, New Jersey. The district court found that "Errichetti claimed to have extraordinary influence in obtaining gambling casino licenses, power over the commissioners who issued the licenses, connections with organized crime, ability to deal in narcotics, guns and counterfeit

[1] "Pet. App." references are to the appendix to the petition in No. 82-1199.

securities, as well as intimate knowledge of which members of the New Jersey legislature could be [bo]ught." Pet. App. 93a-94a.

At one meeting Errichetti, Weinberg, FBI undercover agent Amoroso, who was also posing as a representative of the sheiks, and petitioner Criden, an attorney brought to the undercover agents by Errichetti, discussed problems that might arise if a revolution occurred in the sheiks' country and they wanted to seek asylum in the United States.[2] As the district court found, "[i]mmediately after this conversation Errichetti and Criden formed an alliance in which they undertook to produce for Amoroso and Weinberg public officials who, in return for money, were willing to use their influence with the government on the sheiks' behalf." Pet. App. 95a.

Specifically, Criden told his law partners, petitioner Johanson and Ellis Cook (who testified for the government under a grant of immunity), that if they arranged meetings between Congressmen and the sheiks or their representatives, $100,000 would be paid to each Congressman and shared with the person who arranged the meeting. Johanson then contacted petitioner Myers, who was a member of the House of Representatives. Myers and Errichetti met with Weinberg and Amoroso in a hotel room; the FBI recorded the meeting on videotape. Pet. App. 16a-17a.[3] The court of appeals described the meeting as follows (*id.* at 17a):

> Early in the conversation, Myers boasted of his influence in Congress. When Amoroso mentioned his [earlier] conversation * * * with Errichetti concerning the sheiks' possible immigration problems, Myers replied, "Absolutely. Where I could be of help in this type of matter, first of all, is private bills that

[2] Errichetti and Criden travelled to Florida for this meeting. Pet. App. 94a-95a.

[3] This meeting was held at Kennedy Airport, in the Eastern District of New York. Petitioners travelled from New Jersey and Pennsylvania to attend. Pet. App. 17a.

> can be introduced." Myers explained that delay was important in immigration matters and said, "[I]f I wanta keep somebody in the country, all I do is introduce a private bill." Later in the conversation, Amoroso told Myers that his employer was planning major investments in the United States, possibly including something in Philadelphia. Myers agreed with Amoroso that such an investment in his district would give him "a little protection," and added that it would provide a reason to go "full force and, ah, not that I won't otherwise," and the "perfect opportunity to raise hell before Congress." At the end of the meeting Amoroso handed Myers an envelope containing $50,000 in $100 bills. Amoroso said, "Spend it well"; Myers replied, "Pleasure."

The money in the envelope was divided among Myers (who received $15,000), Errichetti (who received $15,000), Criden, Johanson, and Cook. At a subsequent meeting among Myers, Criden, and two other undercover agents who were posing as representatives of the sheiks, Myers complained about the small size of his payment. *Id.* at 18a.

Myers, Errichetti, Criden, and Johanson were each indicted on three counts: conspiracy to defraud the United States and to violate 18 U.S.C. 201, which prohibits bribery of public officials, in violation of 18 U.S.C. 371; bribery and aiding and abetting bribery, in violation of 18 U.S.C. 201 and 2; and travelling in interstate commerce to carry on the unlawful activity of bribery, in violation of 18 U.S.C. 1952.[4] They were tried together,

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[4] Petitioner Myers unsuccessfully moved to dismiss the indictment, then appealed the denial of that motion. The court of appeals rejected, on the merits, his claims: that 18 U.S.C. 201 violates the Speech or Debate Clause of the Constitution, Article I, Section 6, Clause 2 (Pet. App. 258a, citing *United States* v. *Brewster*, 408 U.S. 501 (1972), and *United States* v. *Johnson*, 383 U.S. 169 (1966)); that his indictment was invalid because it alleged an agreement to perform a legislative act in return for a bribe (Pet. App. 259a, citing *United States* v. *Brewster*, *supra*); that Congress, acting under its Article I, Section 5, Clause 2 power to "punish its

and Myers, the only one of the four to testify, explained that he was only "playacting"; that is, "Myers * * * claimed that Weinberg had told Errichetti, and Errichetti had told Myers, that nothing would ever have to be done for the sheiks in connection with immigration. According to Myers, Errichetti told him just prior to the [first] meeting what he should say to impress the sheik's representatives. Myers claimed that he did not intend to fulfill any of the promises he made at the meeting." Pet. App. 19a. Over the government's objection, the district court instructed the jury that it should convict only if it found that Myers was not "playacting." *Ibid.* All of the defendants were convicted on all counts.[5]

2. Petitioner Lederer, another member of Congress, was also contacted by Johanson. According to Cook's testimony, Johanson said that he had explained the sheiks' feared immigration problems to Lederer and had told Lederer that the sheiks' representatives insisted that the Congressman accept the money personally, presumably in order to ensure that he would be obligated to the sheiks. Lederer and Errichetti met in a hotel room at Kennedy Airport with Weinberg and Amoroso; this meeting was also recorded on videotape. Pet. App. 19a. The

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Members for disorderly Behavior," has exclusive jurisdiction to punish bribery (Pet. App. 260a, citing *United States* v. *Brewster*, *supra*, and *Burton* v. *United States*, 202 U.S. 344, 367 (1906)); that Section 201 should not be interpreted to permit prosecutions growing out of undercover investigations like Abscam (Pet. App. 262a-267a); that Section 201 did not reach Myers' alleged conduct because the subject of the legislative act he promised to take was fictitious (*id.* at 267a-268a, citing *United States* v. *Brewster*, *supra*, 408 U.S. at 526-527); and that some level of suspicion, such as probable cause, should have been required before he was investigated (Pet. App. 269a-270a). This Court denied certiorari. 449 U.S. 956 (1980).

[5] Errichetti and Criden were each sentenced to concurrent terms of six years' imprisonment and fines totalling $40,000. Myers and Johanson were each sentenced to concurrent terms of three years' imprisonment and fines totalling $20,000. Pet. App. 9a.

court of appeals described this meeting as follows (*id.* at 19a-20a):

> Lederer said that Errichetti had briefed him on the sheik's immigration problems. When Amoroso said, "I understand that you can introduce legislation," Lederer replied, "Right, a bill. Private bill. Sure." Lederer then raised a concern that people might ask, "Why all at once does a Philadelphia Congressman want to help somebody . . .?" * * * At the end of the meeting, Amoroso handed Lederer a bag containing $50,000 in $100 bills, commenting, "I hope you don't mind a brown paper bag with this in" and adding, "I hope you spend it well."

Criden distributed this money, giving Cook an envelope containing $5,000 marked "RL" (for petitioner Lederer), and telling Cook that Errichetti had taken $20,000 and Criden and Johanson $15,500. Johanson subsequently passed the $5,000 to Lederer. Approximately five months later, FBI agents interviewed Lederer about the meeting; Lederer denied that Errichetti was present, denied that private immigration bills had been discussed, and denied that he had received a package or a brown paper bag. Pet. App. 20a.

Lederer, Errichetti, Johanson, and Criden were each indicted on four counts. Three paralleled the counts of the Myers indictment; the fourth charged that Lederer, aided and abetted by the others, received an illegal gratuity in violation of 18 U.S.C. 201(g). Errichetti, Johanson, and Criden were severed after they were convicted in the Myers prosecution. At trial, Lederer acknowledged that he had received $5,000 of the $50,000 handed him by Amoroso. His only defense was that he had been entrapped. He was convicted on all counts and sentenced to three years' imprisonment and fines totalling $20,000. Pet. App. 9a-10a.

3. Petitioner Thompson, then a Representative from New Jersey, was introduced to Criden by Joseph Silvestri, a New Jersey businessman, after Criden asked Silvestri

about Congressmen who would be willing to meet with the sheiks' representatives. Criden told Weinberg that Thompson had agreed to cooperate and would meet with Weinberg and Amoroso. At approximately the same time, Criden also explained to Cook, his law partner, that arrangements had been made so that Thompson would not have to accept the money personally. Thompson, Criden, Weinberg, and Amoroso held a videotaped meeting on October 9, 1979, to discuss private immigration bills and their usefulness in delaying deportation. When Amoroso mentioned money, Thompson insisted that he was not interested in receiving money but continued to give assurances that he would do whatever he could to help the sheiks. The meeting ended with no money having been exchanged. Pet. App. 21a.

Later in the same day, Criden alone returned for another meeting with Weinberg and Amoroso. The court of appeals described this videotaped meeting (Pet. App. 21a-22a):

> Criden complained that at the morning session Amoroso had altered their agreement, which, he claimed, called for no mention of money and Criden simply receiving a package. Weinberg and Amoroso denied making such an arrangement, stating that they were willing to have Criden take the package as long as Thompson acknowledged the money. Criden demurred, arguing that Thompson was too experienced and suspicious and could not be expected to act like Myers and Lederer. Criden agreed to talk with Thompson and telephoned to arrange a meeting with the Congressman.

In the evening of that same day, Thompson and Criden met again with Amoroso. Criden said "Frank [Thompson] understands the situation." Amoroso replied, "There's the briefcase" and pointed to a briefcase containing $50,000 in cash. Thompson then said to Criden either "You look after that for me will you?" or "You look at that for me will you?"; the tape is indistinct. Pet. App. 22a; see *id.*

at 2a. The discussion turned to investments, and Thompson said that investments by the sheik in his district "would put him in a position to justify his support of the sheik." *Id.* at 22a. At another point, Amoroso, recalling the morning conversation, said that they had then been "shadow boxing," to which Thompson replied, "Well, you have to be careful." *Ibid.* At the end of the meeting, both Thompson and Criden momentarily lifted the briefcase, and Criden carried it away. Criden subsequently reported to Cook that Thompson had taken $20,000 of the money. *Ibid.*

During the meeting on the evening of October 9, Thompson said he might send his "pal," petitioner Murphy, a Congressman from New York, to meet with the sheiks' representatives. Pet. App. 22a. Thompson then met with Murphy and arranged for him to meet Criden, and on October 20, 1979, Murphy and Criden met Weinberg and Amoroso at a videotaped meeting,[6] which the court of appeals described as follows (*id.* at 23a):

> The discussion centered on the sheik's anticipated immigration problems. Amoroso said that his employers felt it was worth "whatever they have to put out" to obtain assistance. Amoroso explained that his employer had said, "[T]ake the money, go find the people that can, can do this for me." Criden replied, "All you have to do is get a hold of me. I will get a hold of Jack [Murphy]." Later, Weinberg said, commenting on the apparent absence of any problem, "As long as the man says he's going to take care of it. That's what counts." Murphy answered, "Yeah." Weinberg then made clear that it would be a "different deal" if any help was needed for anyone other than the two employers that had been mentioned. "[I]n other words," Amoroso explained, "these, what we're, what we're coming up front with, the money for is just for these two guys." Murphy answered,

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[6] This meeting was also held at Kennedy Airport, and the money was taken to New Jersey and Pennsylvania to be distributed. Pet. App. 23a-24a.

> "Yeah." At the end of the meeting Amoroso picked up a briefcase containing $50,000 in $100 bills. Criden said, "Why don't you give that to Jack." Murphy said, "Howard [Criden] why don't you take care of that."

The court of appeals also stated that the jury could have concluded that Murphy said "Howard why don't you take care of that for me?" *Id.* at 23a n.6.

Criden later told Cook that Thompson was to be given $25,000 of this money, of which $15,000 was Murphy's share; Thompson telephoned Criden and arranged a meeting, and after the meeting Criden told Cook he had delivered the money to Thompson. When questioned by FBI agents about his meetings with Weinberg and Amoroso, Thompson denied that immigration matters had been discussed and denied that anyone had received a briefcase. Pet. App. 24a, 25a.[7]

Subsequently, Amoroso took Murphy aside at another videotaped meeting described by the court of appeals (Pet. App. 25a):

> In this conversation Murphy acknowledged the dangers of speaking about money * * * . Murphy told Amoroso, "[A]ny time money's mentioned where a public official is mentioned, there—there's automatically an ability to link 'em to something illegal or to taking a consideration for something, uh, that he's supposed to do or use his office to do and there's, no public official would ever be involved in anything like

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[7] Subsequent events involving Representative John Murtha of Pennsylvania, who received no money and was not indicted, are also relevant to the Thompson and Murphy prosecutions. Thompson gave Murtha's name to Criden and suggested that Murtha was a candidate to meet with the sheiks' representatives. Murtha testified at trial that Thompson had told him, in conversations on the House floor, "that there would be $50,000 in 'walking around money' for Congressmen willing to help" wealthy Arabs who might need assistance on immigration matters. Thompson also told Murtha that he had enlisted Murphy in the enterprise. Pet. App. 24a.

> that . . . Particularly Thompson, myself, or Murtha.[8] We'd never do anything like that. See?" Amoroso said, "[Y]ou're being coy with me." Murphy said, "Sure." Then when Amoroso said he had been reluctant to give Murphy money, Murphy said, "You didn't, you didn't give me any money. . . . I never, received any money from anyone." The conversation continued with the two discussing future plans for Murphy to meet the sheik.

Thompson and Murphy were indicted (together with Criden and Silvestri, who were subsequently severed) on five counts—bribery, conspiracy, and interstate travel charges paralleling those of the Myers indictment; an unlawful conflict of interest, consisting of the receipt of money "as compensation for services to be rendered before departments, agencies and officers of the executive branch of the Government" in an immigration matter involving foreign nationals, in violation of 18 U.S.C. 203(a); and receipt of an unlawful gratuity, in violation of 18 U.S.C. 201(g). Pet. App. 10a-11a.[9] The basis of the substantive charges against Thompson was his receipt of money exchanged at the October 20 meeting; the October 9 meeting was used as evidence of the conspiracy.

Thompson testified in his own behalf and denied receiving any money. Pet App. 25a. Murphy neither testified nor called any witnesses; his defense, argued in summation, was that he had not received any money. *Id.* at 25a-26a. The interstate travel count was dismissed by the district court. Thompson was convicted of conspiracy, bribery, and receipt of an unlawful gratuity; he was acquitted of unlawful conflict of interest. Murphy was convicted of conspiracy, conflict of interest, and receipt of

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[8] See page 9 note 7, *supra*.

[9] Petitioners Thompson and Murphy took an interlocutory appeal from the denial of their motion to dismiss the indictment. The court of appeals affirmed (Pet. App. 273a-282a), holding that their claims were controlled by its holdings on petitioner Myers' interlocutory appeal. See pages 4-5 note 4, *supra*.

an unlawful gratuity; he was acquitted of bribery. Pet. App. 11a.[10]

4. After the trial and before sentencing, the district court conducted a 16-day hearing to consider claims by all seven petitioners that their convictions should be overturned and the indictments dismissed because of various forms of government misconduct and errors at the trial. The court permitted petitioners to rely on evidence developed in other trials that grew out of the Abscam investigation. The district court denied relief, writing a comprehensive opinion. Pet. App. 84a-249a. Petitioners appealed from their convictions, and the court of appeals, also writing a comprehensive opinion, unanimously affirmed all the convictions except for petitioner Murphy's conviction of unlawful conflict of interest, which it reversed and remanded for a new trial. *Id.* at 5a-83a.

ARGUMENT

Most of the petitioners raise, in some form, two contentions applicable to the Abscam investigation generally —that it should not have been conducted without probable cause to believe that the members of Congress to whom payments were offered were guilty of, or predisposed to commit, related offenses; and that the level of government involvement violated the Due Process Clause. These contentions are without foundation in the law. Petitioners also "voice a chorus of indignation" concerning informant Weinberg (Pet. App. 50a), but they fail to show that any of their claims about Weinberg entitle them to relief. Finally, petitioners make a variety of contentions bearing on their particular cases, many of which are

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[10] Murphy was sentenced to concurrent terms of three years' imprisonment and fines totalling $20,000. Pet. App. 11a. The effect of the court of appeals' reversal of his conviction on the conflict of interest charge (see page 11, *infra*) was to reduce his aggregate fine by $10,000. Pet. App. 83a n.37. Thompson was tentatively sentenced to the maximum terms, as required by 18 U.S.C. 4205(c) to permit further evaluation of his medical condition. Pet. App. 11a.

plainly insubstantial and all of which are of insufficient importance to warrant this Court's review.

1. Several petitioners, and amicus curiae American Civil Liberties Union, contend that the government should not be permitted to investigate members of Congress unless the government already has probable cause to believe that they have committed or are predisposed to commit the offense under investigation. See 82-1183 Pet. 9-14; 82-1199 Pet. 20-44; 82-1255 Pet. 24-27, 49-56; ACLU Am. Br. 6-7. See also 82-1240 Pet. 20-21.

We note at the outset that the government did not engage in random investigations of petitioners; each of the petitioners either approached the undercover agents of his own accord or was introduced as a person willing to engage in corrupt activities by another person who had shown his willingness to do so. See Pet. App. 27a n.7, 149a-150a. More important, however, petitioners do not suggest, and cannot suggest, that the decisions of this Court or the language of the Constitution requires that the government have any level of suspicion—much less probable cause—before undertaking an investigation of the kind at issue here. Whether petitioners' proposed restrictions on criminal investigations are desirable as a matter of policy is a question that belongs to the domain of legislation, not constitutional adjudication.

Probable cause is required only for a search or a seizure, and the videotaped investigation of petitioners did not constitute a search or a seizure. *Hoffa* v. *United States*, 385 U.S. 293 (1966), and *United States* v. *White*, 401 U.S. 745 (1971), establish that one party to a conversation may record it without invading any constitutionally protected interest of the other parties, and petitioners identify nothing in the logic of *Hoffa* or *White* suggesting that a different result should obtain when audio recording is supplemented by video recording—which can only result in a more accurate record of the events at issue. See, *e.g.*, *United States* v. *White*, *supra*, 401 U.S. at 751-753 (plurality opinion) ("If the conduct and revelations

of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking * * *. [W]e are not prepared to hold that a defendant who has no constitutional right to exclude the informer's unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question.").[11]

Similarly, except for one insubstantial contention by petitioner Lederer,[12] petitioners do not assert that they

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[11] Petitioner Thompson asserts (82-1199 Pet. 35-36) that in *White* the government had probable cause to believe that the defendant would engage in criminal conduct during the recorded conversation. But the Court in *White* never referred to the existence of probable cause, and the clear holding of that case is that probable cause is unnecessary.

[12] Petitioner Lederer asserts (82-1183 Pet. 22-23) that the Speech or Debate Clause precluded the government from introducing into evidence a financial disclosure statement he had filed as required by House rules. As the court of appeals explained, however (Pet. App. 58a), this statement was in no sense a contribution to a legislative debate or to any other form of legislative activity; it plainly does not fit within this Court's definition of legislative acts. See page 14, *infra*. Petitioner Lederer's only argument to the contrary is that because establishing rules like that requiring the disclosure statement "is the constitutional prerogative of the House, anything done in that regard, including the filing of reports, is shielded by the Speech or Debate Clause." 82-1183 Pet. 23. This is a non sequitur; nothing in the Constitution suggests that everything done pursuant to the internal rules of the House is "Speech or Debate." "In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process. * * * The Speech or Debate Clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions" (*United States* v. *Brewster*, 408 U.S. 501, 515, 528 (1972) (emphasis in original)). Nor does that Clause protect all actions performed by members of Congress "in their official capacity" (*Gravel* v. *United States*, 408 U.S. 606, 625 (1972)).

Indeed, petitioner Lederer concedes (82-1183 Pet. 23) that he could be punished for filing a false disclosure statement; this would

are being prosecuted for activities that fall within the ambit of the Speech or Debate Clause. That Clause protects only "legislative acts," and as the Court has specifically stated (*Gravel* v. *United States*, 408 U.S. 606, 625 (1972)):

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

It is entirely clear that petitioners' dealings with the undercover agents were not legislative acts; they were, at most, contacts with possible constituents, and the Court has explicitly rejected the suggestion that " 'errands' performed for constituents [or] the making of appointments with Government agencies" are legislative acts. *United States* v. *Brewster*, 408 U.S. 501, 512 (1972). In light of these settled principles, petitioners do not seriously contend that the acts for which they were prosecuted are themselves protected by the Speech or Debate Clause.

Instead, petitioners appear to assert that although the Abscam investigation and prosecution violated no identifiable constitutional provision, the combination of videotaping and the fact that some of the targets were members of Congress somehow made the investigation offen-

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not be so if such statements truly fell within the Speech or Debate Clause. We note that it is well established that members of Congress can be prosecuted for making false statements to agencies of the House of Representatives. See, *e.g.*, *United States* v. *Bramblett*, 348 U.S. 503 (1955) (false statements to House Disbursing Office); *United States* v. *Diggs*, 613 F.2d 988 (D.C. Cir. 1979), cert. denied, 446 U.S. 982 (1980) (false statements to House Office of Finance).

sive to constitutional values.[13] Petitioners cite no case supporting this contention, however. The only argument they advance is that any other result would create an unacceptable danger that the executive branch will harass or intimidate members of Congress for political reasons. See 82-1183 Pet. 12-13; 82-1199 Pet. 22-23; 82-1255 Pet. 25, 52-53.

We do not dispute that politically motivated investigations are improper. But petitioners do not point to, and no court has found, the slightest evidence that the investigation of petitioners was politically motivated. As the court of appeals stated, the suggestion that "the Government targeted the defendant Congressman for political or other impermissible reasons * * * is flatly contradicted by the evidence. The Government had no role whatever in the selection of any of the four Congressmen involved [here] * * *. Criden and Johanson selected Congressmen

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[13] Petitioner Murphy makes a somewhat related argument that purports to rest on the First Amendment but is in fact a challenge to the sufficiency of the evidence against him. 82-1187 Pet. 13-18. Petitioner Murphy does not contend that the act of which the jury found him guilty—"directly or indirectly ask[ing], demand[ing], exact[ing], solicit[ing], seek[ing], accept[ing], or receiv[ing], or agree[ing] to receive anything of value for himself for or because of any official act performed or to be performed by him" (18 U.S.C. 201(g))—is protected by the First Amendment. Instead, he claims that his guilt was "inferred from constitutionally protected activity" (81-1187 Pet. 14; see *id.* at 15, 16 n.15). But it is entirely permissible, and indeed commonplace, to use constitutionally protected speech as *evidence* of an element—usually a mental element—of an offense. To give an obvious example, expressions of personal animosity toward another are ordinarily protected by the First Amendment, but they can of course be used as evidence that the speaker intended to harm the person of whom he spoke.

Petitioner Murphy's First Amendment claim in fact dissolves into a contention that there was insufficient evidence of his guilt. See 82-1187 Pet. 15, 17-18. But there was abundant evidence of Murphy's guilt: for example, the references to money at the meeting, which the jury could view on videotape; the secretive way in which the payment was made, which the jury again saw; the evidence that Murphy had been briefed; and his "coy" videotaped discussion with Amoroso about the virtues of being discreet.

Myers and Lederer. Silvestri selected Congressm[a]n Thompson. Thompson selected Congressman Murphy." Pet. App. 27a n.7. Petitioners also do not explain why the danger of politically motivated investigations requires that *all* prosecutions of members of Congress resulting from investigations initiated without probable cause be barred; in any other case involving a claim that a prosecutorial decision was motivated by an impermissible purpose (see, *e.g.*, *United States* v. *Goodwin*, No. 80-2195 (June 18, 1982); *Oyler* v. *Boles*, 368 U.S. 448 (1962)), the courts would determine in a particular case, relying on rebuttable presumptions if appropriate, whether the action was improperly motivated. Moreover, videotaping would seem to reduce the threat of politically motivated investigations, by eliminating so far as possible the danger that an investigator will misunderstand or distort a target's responses.

In any event, if politically motivated *investigations* violate the Constitution, barring a *prosecution* is an irrational remedy for the violation. On petitioners' own hypothesis, the danger is that the executive branch will conduct such an investigation not in order to institute a criminal prosecution through lawful means, but in order to collect information of lawful but embarrassing acts or statements by members of Congress. Prohibiting a prosecution would, therefore, be unlikely to deter an investigation of the kind petitioners fear; such an investigation could still purport to be concerned with others associated with the member of Congress, or with civil wrongs. Indeed, the principal effect of petitioners' approach would be to benefit those members of Congress whom the executive branch in fact had legitimate reason to investigate and who were in fact willing to engage in criminal conduct.[14] See also *United States* v. *Brewster*,

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[14] As the court of appeals pointed out when it considered Myers' interlocutory appeal (Pet. App. 263a): "Any Member of Congress approached by agents conducting a bribery sting operation can simply say 'No.' Each Member's capacity to reject bribe opportunities could be regarded as sufficient safeguard against the risk that

supra, 408 U.S. at 524-525 ("[F]inancial abuses by way of bribes, perhaps even more than Executive power, would gravely undermine legislative integrity and defeat the right of the public to honest representation.").

In our view, there was nothing repugnant to constitutional values in the conduct of the Abscam investigation. The government did not tape meetings between members of Congress and their families or their close personal or political associates; it taped meetings that the targets believed to be of a purely business character between members of Congress and strangers who were seeking special treatment and who had made no secret of their willingness to spend large amounts of money to obtain it. The values of a democratic society will not be disserved if members of Congress are put on notice that, if the other parties to the meeting so desire, the members' conduct at such meetings may some day be reported, in the most accurate possible form, to the public.

2. Only petitioner Lederer claimed at trial that he was entrapped. Pet. App. 28a.[15] But several petitioners contend that the conduct of the investigation was so outrageous that their convictions must be reversed. See 82-1183 Pet. 15-19; 82-1189 Pet. 45-57; 82-1240 Pet. 13-21; 82-1255 Pet. 31-49. This contention relies on the suggestion made by some of the Justices in *Hampton* v. *United States*, 425 U.S. 484 (1976), that even if a defendant is not entrapped, government involvement in a

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the Executive Branch would successfully use these tactics for political reprisal." The court of appeals further noted (*id.* at 263a-264a) that there is no reason to doubt Congress's ability to recognize any dangers of politically motivated investigations and to take appropriate legislative action. "Once the Supreme Court decided in *Brewster* that the Constitution does not prevent Congress from applying the criminal law enforcement process to a Member's acceptance of a bribe in return for a promise of legislative action, the way was cleared for that process to function without any special constitutional restraints arising from the status of the defendant." *Ibid.*

[15] We discuss the arguments raised by petitioner Lederer in connection with his entrapment defense at pages 26-28, *infra*.

crime may reach such a level that the Due Process Clause may bar a conviction. Petitioners' principal argument in support of this contention is that the government "created" the crimes for which they were convicted rather than "detecting" independently-existing criminal conduct. See, *e.g.*, 82-1199 Pet. 19, 50; 82-1255 Pet. 34, 39-47. Petitioners also assert that the allegedly unsavory background and conduct of FBI informant Weinberg somehow caused the investigation to violate due process (*e.g.*, 82-1240 Pet. 13-21; 82-1255 Pet. 32) and that the inducements they were offered were too large (*e.g.*, 82-1255 Pet. 32, 36-37).

a. It is well settled that the government does not violate the Due Process Clause merely by providing a predisposed defendant with the means and the opportunity to commit a crime. See *Hampton* v. *United States*, *supra*; *United States* v. *Russell*, 411 U.S. 423, 435-436 (1973); *Sherman* v. *United States*, 356 U.S. 369, 372 (1958); *Sorrells* v. *United States*, 287 U.S. 435, 441 (1932). As the court of appeals explained, that is all the government did here (Pet. App. 32a; footnote omitted):

> Though the "sting" was surely elaborate, its essential characteristic was the creation of an opportunity for the commission of crime by those willing to do so. The Government produced people with fictitious identities ready to pay bribes to Congressmen. Word of the availability of bribe money was made known. From that point on, the essential conduct of the agents and their paid informant was to see who showed up to take the bribes and videotape them in the act of doing so. Whatever may be the due process limit of governmental participation in crime, it was not reached here.

The essence of due process is "fundamental fairness" (*Hampton* v. *United States*, *supra*, 425 U.S. at 492 (Powell, J., concurring)), and there is no discernible sense in which the government's role in this investigation resulted in petitioners' being treated unfairly. The investigation did no more than replicate circumstances in which a public offiical might find himself; there was no

possibility that the investigation would incriminate a public official who was not susceptible to accepting illegal payments. As the district court remarked "each [petitioner] was a willing volunteer seeking illegal and corrupt payments." Pet. App. 152a. Nor was this a case in which it might be said that the defendants were no more than minor actors in a government-operated criminal enterprise (cf. *United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978)); petitioners were central figures whose refusal to engage in illegal conduct would have caused this aspect of the Abscam operation to collapse.[16]

Moreover, whatever the importance to society of exposing persons to various temptations to engage in other kinds of unlawful activity (cf. *Hampton*, 425 U.S. at 498 (Brennan, J., dissenting); *United States* v. *Twigg*, *supra*), there is a clear and important interest in exposing public officials who will accept bribes. It is surely reasonable to assume that officials will on occasion be offered illegal payments of the kind involved in this case (cf. *Hampton*, 425 U.S. at 496 n.1 (Brennan, J., dissenting) ("a reasonable * * * inquiry might be whether the accused would have obtained the contraband from a source other than the Government"); the crafty behavior of petitioners Thompson and Murphy indeed appears to be evidence that such schemes are not uncommon. At the same time, it is exceedingly difficult to discover a bribery-related offense except through undercover investigation of some form, because all of those with knowledge of the offense have a strong interest in concealing it. See Pet. App. 263a.[17] In addition, as we have noted, petitioners were not selected at random; they came to the undercover

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[16] *United States* v. *Jannotti*, 673 F.2d 578, 608-609 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982)—an Abscam case—makes untenable any suggestion of a conflict between *Twigg* and the instant decision of the court of appeals.

[17] Congress itself recognized this point in its report on an investigation into alleged efforts by representatives of the Republic of Korea to buy influence. See H.R. Rep. No. 95-1817, 95th Cong., 2d Sess. 93-94 (1978).

agents through contacts that are presumably very similar to those that would be developed if an actual wealthy potential immigrant were seeking to buy influence. And as both courts below noted (Pet. App. 262a n.7, 161a-162a), petitioners' culpable acts were videotaped from start to finish so that they could be brought before the jury in the most complete and accurate fashion possible, not subject to the interpretations of the undercover agents or to contests over credibility. In these circumstances, there is no basis for concluding that the investigation transgressed the Due Process Clause.[18]

b. Petitioners Myers, Errichetti, Johanson, and Criden also argue that the government violated the Due Process Clause in its use of informant Weinberg. See 82-1255 Pet. 31-49; 82-1240 Pet. 13-21. (Petitioner Criden makes a similar argument about petitioner Errichetti. 82-1240

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[18] The court of appeals also disposed correctly of petitioners' suggestion that the inducements were so great that they violated due process. As it noted, these contentions appear to refer not to the $50,000 bribes, but to the large investments the sheiks proposed to make; and as the court explained (Pet. App. 33a):

> We have considerable difficulty with the premise of this argument, which is that a Congressman is privileged to take a $50,000 bribe so long as he simultaneously believes he is bringing the benefits of investments to his district. * * * [Moreover,] the facts of these cases belie the fanciful image of four Congressmen so anxious to bring investment benefits to their districts that they reluctantly accept bribes on which they thought the investments were conditioned. Quite to the contrary, the evidence shows four Congressmen jumping at the chance to take a bribe and discussing investments in their districts as a convenient cover to justify their rendering of purchased legislative services. As Thompson said, anticipating possible criticism for helping the sheik, "I'm in a position to say well of course I'm helping this guy. Why shouldn't I help this guy . . . his money is helping my guys work everyday." Myers put it more bluntly: an investment in the district "gives me a little protection."

In addition, the district court specifically found, in the cases of Errichetti and Criden, "no evidence to connect their motivations for these crimes with their hoped-for bonanzas if the casino project went ahead." Pet. App. 153a.

Pet. 15.) But while petitioners detail Weinberg's alleged misdeeds at some length, they fail to show—and often do not even attempt to show—that these actions amounted to a violation of petitioners' rights.[19]

For the most part, the thrust of petitioners' argument seems to be that the Due Process Clause was violated by the mere "use of a personage such as Weinberg at all to 'sting' United States Congressmen" (82-1255 Pet. 32). Even accepting petitioners' allegations about Weinberg's character and conduct, it is well established that the government must sometimes use informants with such a background; indeed, as the district court explained (Pet. App. 179a), often the authorities use an informant precisely because they hope that a careful and sophisticated criminal, who would sense (or learn, upon investigating) the inauthenticity of an undercover law enforcement officer, might regard the informant as a genuine fellow criminal. For this reason, it is not enough for petitioners to assert that Weinberg was paid by the FBI,[20] or that Weinberg frequently acted in ways characteristic of a criminal.

Nor are petitioners entitled to immunity from prosecution on the basis of their assertions that Weinberg's supervision was inadequate. See, *e.g.*, 82-1255 Pet. 32. The district court specifically found that "the supervision imposed on Weinberg was more than adequate to the circumstances of this investigation." Pet. App. 164a. Even apart from this finding, petitioners attempt to make a serious showing of prejudice in connection with only one series of actions by Weinberg—his so-called "coaching" of petitioner Myers. This "coaching" consisted, according to petitioners, of telling Myers two things: that he should

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[19] See Pet. App. 198-199a ("Throughout these trials, defense counsel sought to make Weinberg's character and activities the key issue before the juries, thus distracting from the conduct and motivations of the defendants. These issues were unsuccessful 'red herrings' at the trials, and they are 'red herrings' still.").

[20] We note that Weinberg was not paid on a contingent fee basis. Pet. App. 51a.

be vigorous in insisting to the sheiks' representatives that he had the power to help the sheiks and would use it; and that he need not actually fulfill his promise. Petitioners also urge that similar "coaching" of Senator Harrison Williams, a defendant in another Abscam prosecution whose case is not before this Court, is also relevant.

i. The first alleged element of the "coaching" consisted simply in urging the suspects to make their representations of what they were willing to do in return for cash as explicit as possible. In many ways, this made the investigation more, not less, fair to the suspects. Indeed, petitioner Murphy criticizes the government for not taking steps to obtain more unequivocal evidence of his guilt. 82-1187 Pet. 18-22.[21] A public official who was unsure about the reason he was being offered money, or who was reluctant to sell his influence, would, when told that he should boast about his power in order to obtain a payment, surely should have demurred and refused to par-

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[21] Petitioner Murphy's argument on this point is essentially that "[g]iven the simple purpose of the October 20 meeting * * * and the agents' complete control over the events," any ambiguities in the videotaped dealings should be strictly interpreted against the government's version of the events. 82-1187 Pet. 20. But as the court of appeals pointed out (Pet. App. 46a), "[u]ndercover agents offering bribes to Congressmen are entitled to simulate the guarded conversation that would be expected of those proposing an unlawful venture. * * * They need not say, 'Congressman, I have here a cash bribe to be exchanged for your corrupt promise to be influenced in your official action.'" See also Pet. App. 246a-247a n.17 (during another Abscam investigation, petitioner Errichetti criticized an undercover agent for being insufficiently subtle in offering a bribe to an official). This is precisely the kind of issue one would have expected petitioner Murphy to raise forcefully before the jury, and there is no reason to second-guess the jury's resolution of it.

In any event, the government did not have "complete control" of the events; it videotaped them, but government agents were only some of the parties to the conversations. We also note that after Thompson insisted that the sheik's representatives be more subtle, it was surely reasonable for the agents to believe that Thompson's "pal," Murphy, who was brought to them by Thompson, would want to operate under a similar arrangement.

ticipate further in the scheme. As the court of appeals concluded (Pet. App. 44a):

> Suggesting how easy it is to commit a crime hardly establishes a due process violation. The "coaching," if it occurred, barely qualifies as any inducement at all; if the script was supplied, no one was coerced into playing his part. Due process challenges to an undercover agent's encouragement have been rejected when one defendant was solicited twenty times before committing an offense, *United States* v. *Esquer-Gamez*, 550 F.2d 1231 (9th Cir. 1977), and when another defendant was tempted by a million-dollar cash deal and prodded by veiled threats, *United States* v. *Reynoso-Ulloa*, 548 F.2d 1329 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978). Whatever conduct might transgress the [Due Process Clause], * * * the facts of the Abscam investigation are not even close to the line. * * * [T]he record reveals that these Congressmen were not children of Hamelin, seduced by the piping of Melvin Weinberg.

ii. As the court of appeals also explained, it is far from clear that the other alleged form of "coaching"—telling petitioner Myers that he need not fulfill the promise he would make in return for the $50,000—was practiced in this case. See Pet. App. 34a-38a. But even assuming that it was, petitioners fail to show how such "coaching" could violate the Due Process Clause. Surely it did not place pressure on Myers to commit the offense; while it may have made the corrupt agreement more attractive to Myers because it suggested that he would not have to uphold his part of the bargain, that is scarcely the kind of inducement that might raise a question under the Due Process Clause. Indeed, the proposal that Myers take the sheik's money and then not fulfill his promise added an element of fraud beyond a simple exchange of influence for cash and should have been at least equally repulsive to an honest official.

Although petitioner Myers now contends only that the coaching violated the Due Process Clause, and does not

contend that it draws into question his guilt under the bribery statute, 18 U.S.C. 201(e), we note that the court of appeals considered and rejected the latter contention. First, as the court explained, the district judge accepted, for purposes of the trial, the contention that it would be a defense to a charge of bribery to show that the official who accepted the money had no intention of carrying out the agreement (Pet. App. 34a-35a):

> Judge Pratt * * * afforded the defendants in the *Myers* case wide latitude to present evidence in support of their claim. He then submitted the claim to the jury, under an instruction that the jury was not to convict unless the Government proved beyond a reasonable doubt that a Congressman who had accepted money in return for a promise to introduce immigration bills had done so with the intention of carrying out that promise. * * * The *Myers* jury obviously rejected the defense, and, on the evidence before them, they were certainly entitled to do so. * * * An entirely plausible inference even from the defendants' evidence, and the one the jury apparently accepted, is that Weinberg was not urging the Congressmen to utter promises they were reluctant to make and did not intend to keep, but was simply anxious to make sure that they fully and unambiguously expressed on videotape the promises they were all too ready to make and fully intended to keep.
>
> Moreover, after the trials were concluded, Judge Pratt afforded the defendants a full opportunity at the "due process" hearing to amplify the record to persuade him, as the trier of fact on the due process claim, that only a charade had occurred. After conducting a wide-ranging hearing, the District Judge found the claim unsupported as a factual matter, and his findings are not clearly erroneous.

In addition, the court of appeals concluded, after examining the language and legislative history of 18 U.S.C. 201(c), that "[w]ith respect to the bribery statute, * * * the defense of fraud is * * * unavailable. If Myers was 'playacting' and giving false promises of assistance to

people he believed were offering him money to influence his official actions, he violated the bribery statute." Pet. App. 42a-43a. We can think of no reason that Congress might have had for immunizing public officials who accept what would be a bribe but who know that they are defrauding the bribe-payer as well as the public. See also *United States* v. *Hood*, 343 U.S. 148, 151 (1952) (in construing a statute related to Section 201(c), "[w]hether the corrupt transaction would or could ever be performed is immaterial. We find no basis for allowing a breach of warranty to be a defense to corruption").

3. Petitioners Thompson and Criden claim that the prosecution improperly concealed exculpatory evidence. See 82-1240 Pet. 21-25; 82-1199 Pet. 62-65. Petitioner Criden's allegations concern only informant Weinberg; he claims that the jury was denied the opportunity "to evaluate not just Weinberg's sordid past, but the full extent of his venality during the investigation" (82-1240 Pet. 25). The district court (Pet. App. 93-98) and the court of appeals (*id.* at 52a-53a) considered these claims in detail and rejected them, showing that the petitioners were not deprived of any material information bearing on Weinberg's credibility. In addition, as both courts below noted, petitioners had ample opportunity to impeach Weinberg's credibility (*id.* at 52a, quoting *id.* at 230a-231a):

> Weinberg admitted that he had been a criminal most of his life, that he had made his living by being a con man, that he had lied and cheated and violated the law from his early teenage years, that he was a convicted felon, that he had made a deal with the government to cooperate in return for probation on his felony conviction in Pittsburgh, and that he had received substantial compensation for his cooperation in the Abscam investigation and trials.

Moreover, as the district judge, who presided at the trials, explained, these cases simply did not turn on Weinberg's credibility. Pet. App. 229a. To the extent the defendants raised serious factual issues at all, those issues concerned the interpretation of allegedly ambiguous acts and

statements made by petitioners. The jury was able to resolve these ambiguities by themselves viewing the acts and listening to the statements, which the government had recorded, and petitioners fail to show how the additional evidence that they assert the government should have uncovered and revealed would have helped them persuade the jury on the questions that were central to the case. Petitioner Criden's principal argument, for example, appears to be only that the additional evidence would have persuaded the jury "to reject Weinberg's denial that he orchestrated a charade in the *Myers* case" (82-1240 Pet. 22); but as we have explained, demonstrating the existence of a "charade" would not have been a defense.

Petitioner Thompson's claim (82-1199 Pet. 62-63) is that the government improperly concealed the "immunity" granted to Congressman Murtha, who testified against him (see page 9 note 7, *supra*). But not only was no immunity granted to Congressman Murtha; the question whether the likelihood of his being prosecuted would affect his credibility was fully aired at trial. The parties stipulated at trial that the government had "no present intention of prosecuting Congressman Murtha" (Tr. 2783),[22] and that stipulation was read to the jury. Petitioner Thompson's counsel stated that that stipulation was "fully acceptable on behalf of Mr. Thompson" (*ibid.*). The district judge, when he instructed the jury, reminded them of this stipulation and warned that Congressman Murtha's testimony should be considered "carefully" (Tr. 3081).

4. Petitioner Lederer, the only one of the petitioners who requested an entrapment instruction, appears to claim (82-1183 Pet. 19-22) that the government introduced insufficient evidence of his predisposition to commit the offenses charged. As the district court and the court of appeals explained, Lederer's prompt response to the offer of a bribe—his "ready complaisance" as Judge

[22] We rely on the brief filed by the United States Attorney in the court of appeals for citations to the transcript.

Learned Hand termed it (*United States* v. *Becker*, 62 F.2d 1007, 1008 (2d Cir. 1933), quoted at Pet. App. 207a)—was ample evidence of predisposition:

> In seeking only $5,000 for himself out of the $50,000 he received, Lederer displayed neither the greed of Myers nor the guile of Thompson and Murphy; nevertheless, the evidence at his trial fully entitled the jury to find his predisposition beyond a reasonable doubt. Predisposition may be established by "the accused's ready response to the inducement." The videotape of the September 11 meeting reveals Lederer responding with alacrity. As he assured the sheik's representatives, "I'm not a Boy Scout."

Pet. App. 29a-30a; citations omitted. See *id.* at 207a-208a.

Petitioner Lederer appears to urge (82-1183 Pet. 20-21) that only past evidence of criminal activity and not just an eager response to a government offer can possibly establish predisposition, but he fails to cite anything in an opinion of this Court, or in logic, that supports such a rule. Nor, contrary to the heading in his petition (*id.* at 19), does he cite any decision of a lower federal court that has embraced such a rule; on the contrary, courts have consistently rejected it. See, *e.g.*, *United States* v. *Jannotti*, 673 F.2d 578, 604 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982) (citing cases).

Petitioner Lederer also urges (82-1183 Pet. 24-25) that this Court resolve what he describes as a conflict among the credits on the question whether a defendant must admit the acts charged, in order to have an entrapment defense submitted to the jury. Specifically, petitioner Lederer suggests that he wished to claim both that he was entrapped and that he was receiving only a legal campaign contribution. But the jury in Lederer's case was given an entrapment instruction (Pet. App. 107a); and Lederer never attempted or offered to testify at trial that he was receiving only a campaign contribution (*id.* at 50a & n.20). Nothing in the district court's opinion, the court of appeals' opinion, or the law of the Second

Circuit[23] suggests that Lederer would have been barred from offering both defenses if he had sought to do so; and having not sought to do so at trial, he certainly cannot now invoke a supposed conflict among the circuits on an issue not implicated in his case.

5. Petitioners assert that the courts below committed a number of other errors, but in no instance do they show why these claims raise issues requiring this Court's review. For example, petitioner Murphy's principal contention (82-1187 Pet. 5-13) is that a supplemental instruction given by the district court in response to the jury's written question was incorrect. Since this was not even a standard instruction but one devised by the district court in an effort to clarify the particular matter about which the jury inquired, it is clear that there is no need for this Court to review the court of appeals' decision that the district court did not err.

In any event, petitioner Murphy's highly attenuated argument on this point is insubstantial. The district judge initially instructed the jury: " 'It is for you to determine based on all of the evidence whether the Government has established beyond a reasonable doubt that the money in the briefcase transferred from Amoroso to Criden on October 20 [the date of the meeting among Amoroso, Weinberg, Criden, and Murphy] was for the benefit of and *eventually received* by defendant Murphy or defendant Thompson or both.' " Pet. App. 62a (emphasis added by the court of appeals). This instruction was given in connection with the bribery charge, but the district court told the jury that it applied to the "re-

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[23] The Second Circuit has permitted a defendant raising an entrapment defense to assert his innocence on other grounds, so long as he "did not take the stand to deny personally his participation in the transaction and did not affirmatively introduce any other evidence that he was not involved." *United States* v. *Valencia*, 645 F.2d 1158, 1172 (2d Cir. 1980). See also *United States* v. *Mayo*, No. 82-1256 (2d Cir. Apr. 8, 1983), slip op. 2976; *United States* v. *Williams*, No. 82-1111 (2d Cir. Apr. 5, 1983), slip op. 2841-2842 n.5.

ceipt" element of the unlawful gratuity and conflict of interest counts as well. *Ibid.* Petitioner Murphy does not object to this instruction. 82-1187 Pet. 7.

During its deliberations, the jury sent the following inquiry to the judge:

> Some members of the jury feel it is possible that defendant Murphy took "direction & control" of the briefcase however momentarily by instructing Criden to take physical possession, making Criden the "executor" of the money in a sense at that point.
>
> May we construe this to be in satisfaction of element one of Count 2 in lieu of "*eventually*["] receiving the money at some later time?

Pet. App. 63a-64a (emphasis by the jury). After an extended discussion with counsel, the district judge responded to the question. His supplemental instruction, reproduced at 82-1187 Pet. App. 97a-99a, began by reminding the jury that the central question was whether Murphy received the money. The district judge then noted that the jury emphasized "eventually," and said that he interpreted the question to be asking whether the receipt *must* have been "eventually, and not then, October 20th," at the meeting. *Id.* at 98a.

The judge answered this question by saying:

> [M]y answer to you is that in applying this element to the defendant Murphy, you may disregard the term eventually. It is for you to evaluate what was said, what happened, what all the circumstances were, and determine from that whether the defendant Murphy received the money.

82-1187 Pet. App. 98a. The district judge immediately added that "[i]t is absolutely critical * * * that he would have to know that it was money that was in the briefcase. * * * [C]ertainly if you should find that he did not know that there was money in that briefcase while that was going on, then unquestionably you should find him not guilty on all the substantive charges." *Ibid.* The district judge then summed up: "If you are talking simply about

the temporal aspect of this, the timing now as opposed to eventually, the answer is yes. You may construe those circumstances to be receipt of this money on or shortly after October 20, 1979" (*id.* at 98a-99a). After the jury resumed its deliberations, Murphy's counsel made the single objection that the judge may have left it unclear at one point that the government had the burden of proof; the district court immediately recalled the jury and clarified that point. *Id.* at 99a-101a.

The jury's inquiry referred specifically to count two, charging bribery, on which petitioner Murphy was acquitted. His counsel never requested the district judge to clarify the relationship between the supplemental instruction and the other counts. See Pet. App. 66a n.24.

Moreover, petitioner Murphy does not point to a single sentence of the instruction that misstated the law. It appears that petitioner Murphy would have interpreted the question differently, to be asking about the relationship that had to exist between Criden and Murphy in order to find that Murphy received the money on October 20.[24] Also, petitioner Murphy in retrospect (although he did not so indicate at the time) apparently would not have reemphasized the point that he was not guilty if he did not know the briefcase contained money, although that was a central contention of his defense (see Pet. App. 65a, 67a; 82-1187 Pet. App. 88a). But at least so long as the district judge did not misstate the law, these were plainly matters to be confided to his discretion, subject to the review of the court of appeals. That court found that "Judge Pratt's handling of the episode was admirable under the circumstances." Pet. App. 68a.

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[24] On this point the court of appeals noted (Pet. App. 67a-68a): Counsel had ample opportunity after hearing both the substance of Judge Pratt's proposed response and the delivery of the response to suggest additional language explicating constructive possession. If the jury's approximation of the concept evident from the text of their inquiry required refinement, the opportunity for amplification was available to the defendants both before and after the instruction was given.

b. Petitioner Thompson contends (82-1199 Pet. 58-61) that the district court, although acting in accordance with established Second Circuit precedent, gave too harsh an instruction on his credibility as a witness. Even petitioner Thompson's own account shows that the judge's statement that Thompson, because he was a defendant, had a motive to testify falsely, was immediately balanced by the statement that " 'it by no means follows that he's not capable of telling the truthful, straightforward story' " (*id.* at 59). In addition, the district judge pointed out that the jury should "consider that [a defendant] takes a real risk by taking the stand and subjecting himself to cross-examination" (Tr. 3055).[25] See *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973) (invoking "the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge").

The cases cited by petitioner Thompson, far from supporting him, show the incorrectness of his contention. In *Hicks* v. *United States*, 150 U.S. 442, 452 (1893), the Court strongly suggested that an instruction pointing out that a defendant who testified had a motive to lie would *not* be sufficient to warrant the reversal of a conviction. In *Reagan* v. *United States*, 157 U.S. 301 (1895), the Court upheld an instruction that drew the defendant's credibility into question at least as sharply as the district court's charge in this case; immediately after the passage quoted by petitioner Thompson (82-1199 Pet. 60-61), the Court stated (157 U.S. at 310-311):

> On the other hand, the court may, and sometimes ought, to remind the jury that interest creates a motive for false testimony; that the greater the interest the stronger is the temptation, and that the interest of the defendant in the result of the trial is of a character possessed by no other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony. * * * [T]he

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[25] See page 26 note 22, *supra*.

> court may charge the jury that the peculiar and deep interest which the defendant has in the result of the trial is a matter affecting his credibility, and to be carefully considered by them.

In *Taylor* v. *United States*, 390 F.2d 278, 284-285 (8th Cir. 1968), the court carefully distinguished between its holding—that the judge could charge a jury that the defendant had a peculiar interest in testifying falsely—and its suggestion that trial judges might wish to avoid such a charge. *United States* v. *Saletko*, 452 F.2d 193, 197-198 (7th Cir. 1971), cert. denied, 405 U.S. 1040 (1972), followed *Taylor* in both respects.

c. Finally, petitioners Myers, Errichetti, and Johanson challenge (82-1255 Pet. 56-64) the district court's admission of evidence of the videotaped meeting among Myers, Criden, and two FBI undercover agents posing as the sheik's representatives, at which Myers complained about the small size of his share of the $50,000 handed to him at the earlier meeting. Petitioners contend that this evidence should not have been admitted because that meeting occurred after the meeting at which the money was passed and the criminal transaction consummated. But it is entirely clear that Myers' subsequent remarks were relevant, because they "illuminat[ed] the nature of the conspiracy" (Pet. App. 56a) between the sheik's representatives and petitioners. Indeed, as the court of appeals noted (Pet. App. 56a), these conversations were in fact part of the conspiracy charged in the indictment (although the district court, in an excess of caution, instructed the jury otherwise) and were therefore fully admissible on that ground. Moreover, it is far from clear that evidence of an inculpatory *statement* like Myers'—that constitutes only an admission or an explanation of a prior act—is evidence of "other crimes, wrongs, or acts" within the meaning of Fed. R. Evid. 404(b). In any event, that rule, on its face, permits evidence of "other crimes, wrongs, or acts" to be admitted for such purposes as "proof of motive, * * * intent, * * * plan [or] knowl-

edge"; the rule does not distinguish between acts committed prior to the alleged crime and subsequent acts.

Petitioners urge that *United States* v. *Boyd*, 595 F.2d 120 (3d Cir. 1978), stands for the proposition that evidence of subsequent acts may not be used. But the panel in *Boyd* narrowly limited its ruling. It suggested that the subsequent acts evidence was being used only to show bad character; it specifically distinguished several cases that permitted evidence of subsequent acts to be admitted; and it explicitly stated that its holding was not inconsistent with *United States* v. *Laurelli*, 293 F.2d 830 (3d Cir. 1961), cert. denied, 368 U.S. 961 (1962). In *Laurelli*, the court of appeals upheld the admission of evidence of an offer of a bribe that occurred after the bribe attempt for which the defendant was indicted, on the ground that it "tended to show * * * intent" (*id.* at 832). The court also noted that "[w]e have held in a number of cases that evidence of similar acts subsequent to the one being tried is admissible" (*ibid.*). Indeed, Judge Hunter concurred in *Boyd* on the explicit understanding that the court had not held that evidence of subsequent crimes was generally inadmissible. See 595 F.2d at 126-127.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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